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No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARATHON OIL COMPANY, a Corporation,
Petitioner,

v.

GAIL HEATH and **THE BALTIMORE & OHIO RAILROAD COMPANY**, a Corporation,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Marathon Oil Company, respectfully petitions this Court for a rehearing of the Court's denial on October 10, 1966, of the petition for a writ of certiorari filed by petitioner. Petitioner files this petition for rehearing pursuant to Rule 58 of this Court and presents, as hereinafter stated, other substantial grounds for granting the petition for writ of certiorari available to petitioner although not previously presented.

In this action the owners of the land contiguous to the railroad right of way which is involved in the dispute own

the oil and gas under the right of way provided the railroad did not acquire title to it by virtue of the 1853 condemnation proceedings. Those landowners are also the lessors of plaintiff or the successors of such lessors and are commonly referred to as royalty owners. Such landowner-lessors were not joined as parties to this suit because they are not indispensable parties. *Texas Co.* v. *Wall,* 107 F.2d 45, 49-50 (7th Cir. 1939). Here, as in *Texas Co.* v. *Wall,* the plaintiff, as an oil and gas lessee, is seeking to enjoin a defendant, also as an oil and gas lessee, from interfering with the plaintiff's leasehold interest; no relief is sought either for or against the landowner-lessors; and the judgments of the Courts below did not give any relief against them. See *Texas Co.* v. *Wall,* 107 F.2d at p. 50.

Since they are not parties to this action, the landowner-lessors are not bound by the judgment of the Court of Appeals. They are free to assert their claims to the oil and gas under the right of way either as plaintiffs or defendants in suits brought to try title to the right of way or suits for accounting for the oil and gas produced from it. In any additional litigation of such nature between petitioner and respondents, which undoubtedly will follow the termination of this action, the landowner-lessors would have to be brought in as parties because their interests would be seriously affected by legal actions of that nature.[1]

The additional litigation thus involving the landowner-lessors would have to be prosecuted in the Illinois State

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[1] In *Texas Co.* v. *Wall,* 107 F.2d 45, 49-50 (7th Cir. 1939) it was recognized that in certain types of cases the lessors of a plaintiff-lessee are indispensable parties. See also *South Penn Oil Co.* v. *Miller,* 175 F. 729 (4th Cir. 1909), and *McConnell* v. *Dennis,* 153 F. 547 (8th Cir. 1907).

courts because the requisite diversity of citizenship for invoking the federal courts' jurisdiction would be lacking. That would not only generate a multiplicity of suits and needless protracted litigation but could, and very likely would, result in a judgment or judgments in the Illinois courts, including the Supreme Court of that state, contrary to the judgment of the Court of Appeals in this case.

In a similar situation this Court took cognizance of a possible conflict between decisions of the Illinois and the federal courts regarding the nature of the title acquired by a railroad in its right of way and used that as a basis for reversing a court of appeals decision. *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940). The procedure followed in *Thompson* v. *Magnolia Petroleum Co.* is appropriate and required in this case provided that this Court upon a full hearing, after granting certiorari, deems the Illinois law not sufficiently clear to affirm the District Court's judgment. Under such circumstances this Court should grant this petition for rehearing, grant certiorari, reverse the judgment of the Court of Appeals, reverse the judgment of the District Court and remand the cause to the District Court "with instructions to modify the order so as to provide appropriate submission of the question of fee-simple ownership of the right of way to the Illinois State courts". See *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940):

For reasons which we have shown in our petition for writ of certiorari, the judgment of the Court of Appeals is wrong and that of the District Court is correct. This Court should grant certiorari and after a review of the judgment of the Court of Appeals, reverse that judgment, but if the Court is not convinced of the necessity and propriety of such action, it is submitted that the most that can be said in justi-

fication for not taking such action is that there are no Illinois cases construing the nature of the title or quantum of estate taken by condemnation under the Illinois 1852 statute. That would put the case in the same posture as *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940),[2] and what the court said there is applicable here, that is: "*Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable.* And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. *Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme.*" 309 U.S. at 484 (emphasis supplied).

WHEREFORE petitioner, Marathon Oil Company, prays (1) that this petition for rehearing be granted, (2) that the denial on October 10, 1966, of the petition for writ of certiorari be vacated, (3) that the petition for writ of certiorari filed herein by petitioner be granted and (4) that upon argument and consideration of the issues herein, the judgment of the Court of Appeals be reversed and the judgment of the District Court affirmed, or in the alternative that the judgment of the Court of Appeals be reversed, the judgment of the District Court be reversed and the cause remanded to the District Court with instructions to enter such orders

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[2] The history of this case in the federal courts is as follows: *Magnolia Petroleum Co.* v. *Thompson*, 106 F.2d 217 (8th Cir. 1939); cert den *Thompson* v. *Magnolia Petroleum Co.*, 308 U.S. 613 (1939), reh gr 308 U.S. 630 (1939), rev 309 U.S. 478 (1940).

and take such action as is necessary to provide appropriate submission to the Illinois State courts of the question of the nature of the title acquired by the railroad by condemnation under the Illinois Act of 1852.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner, Marathon Oil Company, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and the petition presents other substantial grounds available to petitioner although not previously presented, and said petition is restricted to the grounds above specified.

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